82-1415

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDMUNDSON INVESTMENT COMPANY
and WILLIAM L. EDMUNDSON, III,
Petitioners,

v.

FLORIDA TRECO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. This Court should grant the writ because the Texas courts, by enforcing a mortgagee's (Respondent's) claim of deficiency on a debt following its non-judicial foreclosure and an intentionally low bid price, have taken Petitioners' property without due process of law and in derogation of the prior federal court determination between these parties that the property is worth substantially more than the debt.

2. This Court should grant the writ because Respondent's use of the Texas non-judicial foreclosure procedure and the state judicial process to create and collect a purported deficiency has infringed federal constitutional rights of Petitioners.

3. This Court should grant the writ because the decision by the Texas courts, in authorizing the foreclosing creditor's artificially-low bid price to control over a prior federal court determination between these parties that there is a substantial equity in the property over the debt, raises important questions touching the accommodation of state and federal interests under the Constitution.

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Petitioners, Edmundson Investment Company and William L. Edmundson, III, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas infringing and denying Petitioners' rights under the Fourteenth Amendment and full faith and credit clause of the United States Constitution.

OPINIONS BELOW

The judgment sought to be reviewed by this petition for writ of certiorari was entered by the Court of Appeals

for the Fourteenth Supreme Judicial District of Texas with opinion.[1] The Court of Appeals' opinion and judgment, the orders of the Supreme Court of Texas declining review pursuant to Petitioners' application for writ of error and motion for rehearing, and the district court order which deprive Petitioners of their property without due process of law are included in the Appendix at A-1 thru F-1.[2]

JURISDICTION

The Texas Fourteenth Court of Appeals entered its judgment and opinion on April 1, 1982. The Supreme Court of Texas declined review on September 22, 1982, by denying Petitioners' application for writ of error in a per curiam opinion. Petitioners' motion for rehearing was denied November 24, 1982. This petition for writ of certiorari was filed within 90 days thereafter. *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). Jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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1. *Edmundson Investment Co. v. Florida Treco, Inc.*, 633 S.W.2d 599 (Tex. Civ. App.—Houston [14th Dist.], writ ref'd n.r.e. per curiam, 25 Tex. Sup. Ct. J. 493 (Tex. 1982)) (App. at A-1).

2. Pursuant to U.S. Sup. Ct. R. 21.1(k), critical portions of the record are included in the accompanying Appendix and are cited as App. at ____.

> person of life, liberty or property without due process of law. . . .

Article 4, Section 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

STATEMENT OF THE CASE

I. Background Facts

In 1972 Petitioner Edmundson Investment Company ("Edmundson Investment") executed a $2,323,000.00 promissory note payable to Respondent through its predecessor in interest, Barnett Mortgage Trust (Supp. Tr. 16).[3] Petitioner William L. Edmundson, III ("Edmundson"), guaranteed payment of the note. The note was secured by a deed of trust to land and improvements known as the North Padre Island Beach Hotel ("the property") (Supp. Tr. 18).[4]

In 1974 Edmundson Investment filed a Chapter XI proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, styled and numbered *In re Edmundson Investment Company,*

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3. References to that portion of the record included in the Supplemental Transcript are cited as Supp. Tr. _____. References to that portion of the record included in the original Transcript are cited as Tr. _____.

4. Under Texas law, a deed of trust allows conveyance of the security to a trustee, who may sell the property at the mortgagee's request if the mortgagor defaults. This may occur by private sale pursuant to Article 3810 of the Texas Revised Civil Statutes (App. at O-1).

Debtor, Bankruptcy No. 74-HB-192. Pursuant to Bankruptcy Rule 11-44, the creditors of Edmundson Investment, including Respondent, were stayed from foreclosing on deeds of trust without the Bankruptcy Court's approval.

In October, 1977, Respondent filed in the Chapter XI proceeding a Complaint to Modify Stay against Petitioner Edmundson Investment (Tr. 12-22). By its Complaint and adversary proceeding, Respondent sought relief from the Bankruptcy Rule 11-44 stay and the Bankruptcy Court's authorization to foreclose on the property. In its initial Complaint, Respondent took the position that there was no equity in the property because the property was worth substantially less than the amount due Respondent under the note (Tr. 14).

The parties subsequently entered into a proposed settlement of the suit. They filed with the Bankruptcy Court a Joint Application for Authority to Compromise Controversy (App. at G-1). In the Joint Application, both parties, including Respondent, represented as follows:

> "That both Barnett [Respondent] and Edmundson [Petitioner] hereby *stipulate and affirmatively allege* that the Padre Island Beach Hotel . . . has *a substantial value in excess of . . . [Petitioner's] indebtedness. . . .*" (App. at G-2) (emphasis added).

A Settlement Agreement was submitted to the Bankruptcy Court with the Joint Application. As signed and sworn to by the parties, it likewise provided that:

> "There is equity in the hotel property (Padre Island Beach Hotel) over and above the amount of the indebtedness owed to . . . [Respondent] which is secured thereby." (Tr. 26).

The Bankruptcy Court conducted an evidentiary hearing on the parties' Joint Application. At the hearing, Edmundson testified as the owner of the property that it had a fair market value of approximately $3,500,000.00. As compared to the debt of approximately $2,200,000.00 existing at that time, this constituted an undisputed equity in the property of approximately $1.3 million dollars.

On the basis of the evidence presented at the hearing, the Bankruptcy Court entered an Order Authorizing Compromise of Controversy (App. at H-1) and approved the parties' Settlement Agreement. In its Order, the Bankruptcy Court made the following finding:

> "It further
> appearing to the Court having heard the testimony and having the Exhibits that there is substantial equity in the real property . . .
>
> *Upon such testimony and exhibits the Court does specifically find that a substantial equity does exist in such property. . . .*" (App. at H-2) (emphasis added).

This Order constituted a final adjudication of the matters raised in the adversary proceeding and Respondent's Complaint.

The approved Settlement Agreement provided that Edmundson Investment would recommence payments on the note to Respondent (Tr. 26). It further contemplated that if Edmundson Investment thereafter defaulted in payment, Respondent would be exempted from the Rule 11-44 automatic stay and have the right to foreclose on the property.[5]

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5. The Settlement Agreement provided:
"In the event [Edmundson Investment] shall default in any of the terms and conditions of its indebtedness to [Respondent] or

Thereafter, a default under the note occurred. Respondent undertook steps to foreclose upon the property and did conduct a non-judicial foreclosure sale pursuant to Article 3810,[6] Texas Revised Civil Statutes. Notwithstanding the earlier stipulations and finding that the property was worth substantially more than the debt, Respondent bid in the property for $1.75 million dollars, or about $405,000 less than the approximate $2.15 million balance owing on the note. Respondent thereby regained title to and ownership of the property. Respondent then filed suit in state district court to collect its claimed deficiency on the promissory note following foreclosure.

> the terms of this Agreement, then [Respondent] may, at its option and without further order of the Bankruptcy Court, enforce and exercise all rights, powers and remedies provided for in the attached loan documents at law or in equity. (Tr. 27).

As noted previously, the Settlement Agreement also contained the parties' joint stipulation that "there is equity in the hotel property . . . over and above the amount of the indebtedness owed to [Respondent] which is secured thereby." (Tr. 26).

Respondent has argued that Petitioners, by agreeing to foreclosure upon default, thus agreed that a deficiency on the debt following any such foreclosure could be enforced. Carried another step further, Respondent hints that Petitioners have waived their constitutional challenges to the deficiency-related procedure at issue in this proceeding. Given the stipulation of equity by the parties in the same agreement, Respondent's argument that Petitioners agreed that a deficiency on the debt could be created upon foreclosure is unsupportable. Nothing in the loan or court documents makes reference to any deficiency following foreclosure. Additionally, this Court has made clear that there is a strong presumption against a party's waiver of constitutional rights, and a required showing of knowing and definite relinquishment of such rights. *See Fuentes v. Shevin*, 407 U.S. 67 (1972); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

6. As mentioned in note 4, *supra*, Article 3810 is the Texas non-judicial foreclosure statute (App. at O-1). It sets forth certain requisites not relevant to this proceeding with respect to notice of and the place of sale. It does not make reference to or address issues raised when the foreclosing creditor claims a deficiency on the debt following foreclosure. Texas law in this regard has been established by the judiciary, as discussed *infra*.

II. History of Proceedings

In the trial court, Respondent alleged on motion for summary judgment that under Texas law it was entitled to recover the alleged deficiency on the note between the amount of the debt and its lesser bid price at the non-judicial foreclosure sale. *See Maupin v. Chaney*, 139 Tex. 426, 163 S.W.2d 380 (1942).

Petitioners by answer and cross-motion for summary judgment pled, *inter alia*, that Respondent's procedure to create the "deficiency" at private foreclosure and to enforce its claim through invocation of the state judicial process constitutes an unconstitutional taking of Petitioners' property without due process of law in light of the Bankruptcy Court's prior determination and finding of fact of a substantial equity in the property. (App. at H-2). Petitioners have argued that Respondent's non-judicial creation of an artificial and fictional "deficiency" through the abracadabra of a bid price, coupled with judicial enforcement of same, cannot constitutionally take precedence over (1) the Bankruptcy Court's determination and finding of fact to the contrary that allowed Respondent the right to foreclose and (2) fundamental rights of estoppel, res judicata and full faith and credit accorded thereby.[7]

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7. In support of the continuing validity and binding effect of the Bankruptcy Court's adjudication, and being fully responsive to the common law tenet that "changed circumstances" can impact the viability of an earlier court order, *see, e.g., Cone v. Lubbock*, 395 S.W.2d 651, 654 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.), Petitioners also submitted affidavit evidence undisputed by Respondent that there remained *in fact* at the time of foreclosure a substantial equity in the property consistent with the Bankruptcy Court's earlier finding. (Supp. Tr. 116-19).

Petitioners have timely and properly raised and presented their federal constitutional claims at each level of the proceedings as follows:

a. Trial Court

   1. First Amended Original Answer (App. at I-1).
   2. Cross-Motion for Summary Judgment (App. at J-1).

b. Court of Appeals for the Fourteenth Supreme Judicial District of Texas

   1. Brief for Appellants, Points of Error Five and Six (App. at K-1).
   2. Motion for Rehearing, Assignment of Error Seventeen (App. at L-1).

c. Supreme Court of Texas

   1. Application for Writ of Error, Point of Error Four (App. at M-1).
   2. Motion for Rehearing, Point of Error Five (App. at N-1).

The trial court granted Respondent's motion for summary judgment without separate opinion. The Fourteenth Court of Appeals' decision, to which this writ is addressed, specifically discussed the federal constitutional question raised by Petitioners, and concluded that the challenged procedure is not unconstitutional. (App. at A-10). The Supreme Court of Texas declined review by per curiam opinion, finding no reversible error in the lower court's denial of Petitioners' federal constitutional claim. (App. at C-1).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Sanctions and Enforces an Application of the Texas Non-Judicial Foreclosure Procedure which Infringes Upon and Denies Petitioners' Rights Under the Fourteenth Amendment and Full Faith and Credit Clause.

A. Preliminary Statement

At the outset, Petitioners wish to stress that they have not and are not challenging the constitutional validity of the Texas non-judicial foreclosure statute, Article 3810, V.A.T.S. *See Barrera v. Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975) (finding no state action to support due process challenge to non-judicial foreclosure sale). Petitioners do not contest the validity of the foreclosure procedure and corresponding transfer of title in the property to Respondent.

What is at issue is Respondent's subsequent invocation of the state judicial process to enforce a "deficiency" on the debt it created through its non-judicial foreclosure sale, notwithstanding the Bankruptcy Court's prior finding that there is substantial equity and not a deficiency as between this particular property and debt. The Bankruptcy Court's earlier finding was the precondition to Respondent's foreclosure—*but for* the finding of equity in the property, Respondent had no right to foreclose because of the automatic stay. This Court should grant the writ to determine whether this earlier federal judicial determination and value comparison, which allowed Respondent the right to foreclose in the first place, can be constitutionally supplanted through state court enforcement of Respondent's private foreclosure bid price.

B. The Bankruptcy Court Determination and the Constitutional Rights Accorded Thereby

Respondent invoked the jurisdiction of the United States Bankruptcy Court to obtain a lifting of the Rule 11-44 stay in effect as to Edmundson Investment. Based on its stipulation of "substantial equity" and the evidence presented at hearing, Respondent received a green light to proceed with foreclosure in the event of default.

The Bankruptcy Court's Order of December 8, 1977, fully adjudicated and concluded the matters raised in Respondent's proceeding against Edmundson Investment. The value of Respondent's security (the property) versus the note indebtedness was the crucial question in the proceeding. The Bankruptcy Court held, in response to the parties' Joint Application, testimony and exhibits presented at the hearing, that "a substantial equity does exist in such property. . . ." (App. at H-2). The Bankruptcy Court's Order fully and finally terminated the proceeding filed by Respondent and constituted under federal and Texas law a final adjudication of the issues raised therein. 2 *Collier on Bankruptcy* § 24.38 (14th ed. 1976); *P. S. Seymour-Heath v. Goggin*, 389 F.2d 327 (9th Cir. 1968); *Ex parte Gorena*, 595 S.W.2d 841, 844 (Tex. 1979); *Pollard v. Steffens*, 343 S.W.2d 234 (Tex. 1961).

The rights and defenses of estoppel, res judicata and full faith and credit available to Petitioners under federal and Texas law all attach to the earlier proceeding and the Bankruptcy Court's adjudication and fact finding. Under doctrines of ordinary and judicial estoppel, a party to litigation who takes a position by allegation, admission, stipulation and argument, wherein any relief is granted in its favor, is bound by its earlier position and estopped

from taking an inconsistent position in a later proceeding between the same parties. *Swilley v. McCain,* 374 S.W.2d 871, 875 (Tex. 1964). Collateral estoppel bars relitigation in a later suit of issues actually litigated and necessary to the outcome of an earlier suit. *Parklane Hosiery Company, Inc. v. Shore,* 439 U.S. 322 (1979); *Olivarez v. Broadway Hardware, Inc.,* 564 S.W.2d 195, 199 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). Under res judicata a right, question or fact put in issue and finally determined by a court of competent jurisdiction as a ground of recovery or defense cannot be disputed in a subsequent suit between the same parties or their privies. *State of Oklahoma v. State of Texas,* 256 U.S. 70 (1921); *Texas Water Rights Comm'n v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979). The full faith and credit clause requires that the courts of each state give full faith and credit to orders, judgments and decrees rendered not only by sister states but also by courts of the United States, including the federal bankruptcy courts. *Supreme Lodge, K. P. v. Meyer,* 265 U.S. 30 (1924); *Swift v. McPherson,* 232 U.S. 51 (1914).

Constitutional protections under the due process clause of the Fourteenth Amendment include those rights vested in a litigant by the common law. *Screven County v. Brier Creek Hunting & Fishing Club,* 202 F.2d 369, 371 (5th Cir. 1953). These include those rights accorded by adjudication and judgment in an earlier proceeding, including estoppel and res judicata. *See, e.g., United States v. Haines,* 485 F.2d 564 (7th Cir. 1973), *cert. denied,* 417 U.S. 977 (1974); *Southwest Airlines Co. v. Texas Int'l. Airlines,* 546 F.2d 84, 94-103 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977); *State of Maryland v. Capital Airlines, Inc.,* 267 F. Supp. 293, 304 (D. Md. 1967). Under

the due process clause, Petitioners' rights stemming from the Bankruptcy Court's earlier judgment and decree cannot be undercut or rendered ineffective by arbitrary action that is judicially enforced by the state.

C. State Procedure and Action: Enforcing the Fiction

Only one relevant event intervened between the Bankruptcy Court's earlier determination of equity in the property and Respondent's subsequent suit to enforce and collect the claimed deficiency: Respondent's non-judicial foreclosure sale of the property following default. Respondent bid in the property at a price low enough to create a substantial deficiency of approximately $405,000 between the bid price and the debt. The undisputed facts of record, however, are consistent with the Bankruptcy Court's finding of substantial equity in the property as the property was worth approximately twice the amount of the debt at the time of foreclosure. (Supp. Tr. 116). The windfall contemplated by Respondent is unmistakable: recovery of secured property worth twice the debt, plus a $405,000 deficiency judgment (plus interest) against Petitioners.

In Texas, a non-judicial foreclosure under Article 3810 reduces the debt by the amount of the bid price. Typically, the foreclosing creditor will bid the property in at an amount less than the outstanding debt. The creditor can then seek a state court judgment against the debtor personally for the paper deficiency. *Campagna v. Underwriters at Lloyd's London*, 549 S.W.2d 17 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). The unreasonableness or inadequacy of the bid price as compared with the real value of the property is not a defense to the deficiency

claim. *American Savings & Loan Ass'n v. Musick*, 531 S.W.2d 582 (Tex. 1973). While Texas concededly permits the creation and enforcement of an artificial deficiency as described above,[8] many states require that the foreclosing creditor prove and the appropriate state court find that a deficiency exists in fact between the value of the regained property and the debt before a deficiency judgment against the debtor will be rendered.[9]

Respondent argues that the prior Bankruptcy Court adjudication of equity should be rejected in favor of the artificial deficiency it engineered at the foreclosure sale. The lower courts have adopted Respondent's argument and enforced the deficiency against Petitioners, notwithstanding the earlier federal court adjudication.

Respondent's invocation of the state judicial process to enforce its claimed deficiency and sustain its course of conduct under Article 3810 constitutes state action sufficient to invoke due process considerations. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601

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8. The present Texas procedure allowing a deliberately-low bid by a mortgagee to create a windfall deficiency and a judgment against the debtor for an amount far greater than the true deficiency, if at all, has been characterized as a "great injustice" and soundly criticized because of the lack of any judicial determination of the regained property's actual value. T. McElroy, *Proposals for Revisions to Texas Civil Statutes*, 1981 TEX. BAR J. 257, 262. Even one Texas court has candidly recognized that the current *ex parte* procedure can result in a "windfall" deficiency to the foreclosing creditor. *Crow v. Heath*, 516 S.W.2d 225 (Tex. Civ. App.—Corpus Christi 1974 writ ref'd n.r.e.). *See generally* R. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980) (hereafter "Washburn").

9. *See, e.g., Dieffenbach v. Attorney General*, 604 F.2d 187, 192 n. 9 (2d Cir. 1979) (Vermont); *Northrip v. Federal Nat'l Mortgage Ass'n*, 527 F.2d 23, 24 n. 1 (6th Cir. 1975) (Michigan). *See generally* Washburn, *supra* n. 8 at 907-913.

(1975); *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 160 n. 10 (1978); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Virginia v. Rives,* 100 U.S. 313 (1880). This Court has recognized such state action in the debtor/creditor context where a creditor invokes the authority of a state court to assist and further an unconstitutional procedure under state law. *See North Georgia Finishing, Inc. v. Di-Chem, Inc., supra; Flagg Bros., Inc. v. Brooks, supra* at 160 n. 10.

D. Infringement of Petitioners' Constitutional Rights

The purported deficiency on the debt created by Respondent and enforced by the Texas courts is a fiction. It is based solely on the bid price arbitrarily selected by Respondent in regaining the property. It is not based on a judicial determination of the property's true value versus the outstanding debt amount.

Under the due process clause, constitutional protections cannot be infringed or defeated by fictions, labels or semantics. *See, e.g., Giaccio v. State of Pennsylvania,* 382 U.S. 399, 402 (1966); *Knight v. State Bd. of Education,* 200 F. Supp. 174, 178 (M.D. Tenn. 1961). This maxim is at the heart of Petitioners' claim. The lower courts have exalted fiction over judicial fact. The Bankruptcy Court's factual determination as between these parties, this property and this debt prior to foreclosure that a substantial equity exists, and the constitutional protections vested by virtue of this earlier adjudication, are being supplanted and overridden by Respondent's arbitrarily-selected bid price and deficiency action. Having used the Bankruptcy Court's finding of equity as the vehicle for foreclosure, Respondent now argues that the finding is irrelevant. Such

a result is at odds with the notion of fundamental fairness embodied in the due process clause.[10] *See Lassiter v. Department of Social Service*, 452 U.S. 18, 101 S.Ct. 2153, 2163 (1981). The state court's sanction and enforcement of such a procedure constitutes a deprivation of Petitioners' due process rights.

This Court should grant the writ because the decision of the lower courts is in derogation of Petitioners' rights secured under the Constitution and is not in accord with the applicable decisions of this Court. Certiorari is appropriate where federal rights are infringed by a state court decree or the unconstitutional application of a state procedure or statute. *See, e.g., Live Oak Water Users' Ass'n v. R.R. Comm'n*, 269 U.S. 354 (1926); *Virginia v. Imperial Coal Sales Co.*, 293 U.S. 15 (1934).

II. By Permitting Respondent to Override a Federal Court Determination of Substantial Equity Through an Artificially-Low Bid Price at a Non-Judicial Foreclosure Sale, the Decision Below Raises Substantial Questions Touching the Accommodation of Federal and State Interests Under the Constitution.

Certain federal court decisions have rejected and refused to be bound by the fiction presently permitted under Texas law. One decision is on point. *In the Matter of Sonny Martini Inns, Inc.*, 2 Bankr. Ct. Dec. 642 (Bankr. S.D. Tex. 1976) (hereinafter "*Martini*"). In *Martini*, the same fact situation was presented: (1) in a bankruptcy proceeding, the secured creditor with a deed of trust filed

10. Tellingly, even the Texas Fourteenth Court of Appeals concedes that Petitioners' arguments are "emotionally attractive." (App. at A-4).

a complaint seeking relief from the Rule 11-44 stay and judicial permission to foreclose; (2) at hearing, the court determined there was equity in the property and authorized a later foreclosure; (3) the creditor thereafter foreclosed under Texas Article 3810 and bid the property in at an understated amount resulting in a claimed deficiency of approximately $442,000.00; then (4) the secured creditor filed a new action to recover the claimed deficiency.

The court in *Martini* recognized that under Texas law a foreclosing creditor's bid price can alone create a deficiency without regard to the adequacy of the bid. The court, however, refused to be bound by this intervening fiction and noted:

> "[T]he Court is rather taken aback to find [the secured creditor] who first invoked the jurisdiction of the Bankruptcy Court attempting to obtain a modification of the Rule 11-42 Stay, claiming the deficiency is established not by the trial it invoked and in which it participated but rather by the foreclosure sale in which [the secured creditor] was the controlling force." *Id.* at 643.

The court in *Martini* concluded, in the absence of allegations or proof that the property had decreased in fact to an amount less than the debt,[11] that the creditor was

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11. The court in *Martini* astutely recognizes the common law rule that subsequently changed circumstances are relevant in determining whether a party is estopped by action, rulings and decrees in an earlier proceeding. *See, e.g., Cone v. Lubbock, supra* n. 6. Here, the evidence of record is undisputed that the facts as found by the Bankruptcy Court to support its finding of substantial equity had not changed in the eighteen months between the court decree and subsequent foreclosure so as to impact the continued viability of the earlier determination. (Supp. Tr. 116).

bound by its earlier judicial action and the judicial determination of equity which it solicited as a *sine qua non* to foreclose. The *Martini* decision thus sees through the intervening fiction of a "depressed value" sale controlled by the creditor under state law and upholds the sanctity of the earlier federal court determination which had been sought by the creditor as a means to foreclose.

Other federal courts have rejected in the federal bankruptcy context the use of state non-judicial foreclosure procedures and artificially-depressed bid prices to defeat a debtor's equity in property. *See, e.g., Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (private foreclosure with bid price of 55% of true value set aside as fraudulent conveyance under section 67d of Bankruptcy Act). As in *Martini*, the Fifth Circuit Court of Appeals refuses to be bound by the Texas non-judicial foreclosure and bid price procedure where substantive federal rights or policies are at stake.

The state court's exaltation of Respondent's intentionally-deficient bid price over the federal court's equity determination does violence to the full faith and credit clause. Prior judicial decrees cannot be rendered null and void through ingenious devices. *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1268 (5th Cir. 1969). Here, but for the Bankruptcy Court's earlier finding of equity in the property, Respondent would not have been able to foreclose. Once having foreclosed pursuant to the court's permission, Respondent pursuant to state procedure and process now seeks to discard this judicial determination altogether and substitute the bid price as determinative of the value issue. Granting of the

writ is appropriate where important issues under the full faith and credit clause are at stake. *See, e.g., Allstate Ins. Co. v. Hague,* 440 U.S. 410 (1981); *Swift v. McPherson,* 232 U.S. 51 (1914).

Given the Bankruptcy Court's prior involvement with these same parties, property and debt, this Court has a compelling interest in ensuring that state self-help procedures such as Texas Article 3810 and the state judicial process not be used to circumvent and discard the Bankruptcy Court's prior determination and the concomitant constitutional protections afforded Petitioners. Respondent has created a fictional "deficiency" through means of an arbitrarily-low bid price and successfully enforced same in the Texas courts. This "deficiency" cannot constitutionally take precedence over the prior federal judicial determination that the value of this particular security substantially exceeds the debt. To enforce and sustain such a result is to unconstitutionally override the Bankruptcy Court's prior ruling and deprive Petitioners of their due process protections.

The Court thus should grant the writ because of the substantial and sensitive issues raised as to the accommodation of federal and state interests under the Constitution. *See, e.g., Kosydar v. National Cash Register Co.,* 417 U.S. 62, 65 (1974).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: February 22, 1983

APPENDIX A

Opinion filed April 1, 1982.

NO. C-2936

EDMUNDSON INVESTMENT COMPANY, ET AL,
Appellants

v.

FLORIDA TRECO, INC., Appellees

Appeal from the 157th District Court
Harris County
Cause No. 80-11,087

Appeal is brought from a suit by appellee to recover a deficiency resulting from a foreclosure sale pursuant to a deed of trust. The trial court granted a summary judgment in favor of appellee, and appellants perfected this appeal. We find no error in the judgment below and affirm.

The facts of this case cover an eight year period of negotiation and litigation. In 1972, appellant Edmundson Investment Company (EIC) executed a promissory note in the amount of $2,323,000 payable to Barnett Mortgage Trust, appellee's predecessor in interest. The promissory note was executed in connection with property containing the North Padre Island Beach Hotel (property) in Nueces County, Texas. EIC executed a deed of trust and a secur-

ity agreement as collateral for the loan, and William L. Edmundson, III (Edmundson) personally guaranteed payment of the note.

In 1974, EIC filed a Chapter XI bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, the Honorable John R. Blinn presiding. At the time of the institution of the bankruptcy proceeding, EIC was in default of the promissory note with Barnett. (The bankruptcy proceeding did not include Edmundson personally, but only EIC.) An automatic stay provision was instituted in conjunction with the Federal Rules of Bankruptcy Procedure, thereby preventing Barnett from foreclosing its deed of trust on the property.

Barnett instituted a proceeding in the Bankruptcy Court in October, 1977, in an attempt to modify the automatic stay. Subsequently, EIC and Barnett entered into a settlement agreement (Joint Application for Authority to Compromise Controversy) which was heard by the Court on December 8. Through the approved settlement agreement, EIC promised to pay Barnett the outstanding indebtedness on the note in monthly installments, with a $2,000,000 final "balloon payment" due on or before June 30, 1979. In addition the agreement provided Barnett would be exempted from the automatic stay and would have the right to foreclose on its deed of trust should EIC default.

Shortly before the balloon payment was due, Edmundson obtained the permission of the Bankruptcy Court to transfer to him personally all of EIC's assets. Edmundson agreed to assume all of EIC's debts and to personally indemnify all creditors.

In June, 1979, a default occurred on the settlement agreement when appellants failed to make the final balloon payment. Appellee exercised its right to foreclose under the agreement and set a non-judicial foreclosure sale for September 4, 1979. Prior to the foreclosure sale, Edmundson executed and filed a warranty deed on August 31 in an attempt to convey the property to appellee. Appellee, however, went forward with the non-judicial foreclosure sale pursuant to Article 3810, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1981). Appellee was successful in its bid for the property and purchased the same for $1,750,000. Since the purchase price was approximately $405,000 less than the outstanding balance of $2,150,000 owing on the promissory note, appellee filed the instant action in the 157th District Court to make up the deficiency. The trial court granted appellee's Motion for Summary Judgment, and held the appellants jointly and severally liable for the $405,000.

Appellants raise nine points of error on appeal, most of which can be considered together. First (considering appellants' points of error 1, 2, 3, 4 and 9), appellants assert the trial court erred in granting appellee's Motion for Summary Judgment, claiming appellee is barred from asserting this action by its conduct, elections, representations and stipulations in the proceeding in the Bankruptcy Court, and by general concepts of collateral estoppel, res judicata and full faith and credit.

These grounds of error concern the Chapter XI proceedings of the Bankruptcy Court in 1974 and the December 8, 1977 settlement agreement. The gist of appellants' argument is that because of appellee's previous position in federal bankruptcy court, it cannot now assert

a new and different claim in relation to this case. In the Joint Application, appellee stipulated and affirmatively alleged the property in question had substantial value at that time in excess of the indebtedness. By so stipulating, appellee derived a benefit in the form of the property being exempted from the automatic stay. Therefore, since appellee benefited from agreeing to one value of the property, appellants maintain appellee cannot now profit by now contending the value of the property was insufficient to meet the debt.

While appellants' argument is emotionally attractive, it does not find support in the law. Regardless of the different proposed doctrines, whether they be estoppel, collateral estoppel, res judicata or full faith and credit, appellee cannot be barred from asserting its right of non-judicial foreclosure under Article 3810. The settlement agreement signed by appellants and approved by the Bankruptcy Court provides:

> In the event Edmundson shall default in any of the terms and conditions of its indebtedness to Barnett or the terms of this Agreement, then Barnett may, at its option and without further order of the Bankruptcy Court, enforce and exercise all rights, powers and remedies provided for in the attached loan document at law or in equity.

The attached loan documents provide the note and the mortgage agreement shall be interpreted "in accordance with the laws of the State of Texas." Appellee therefore had the right under the agreement to obtain non-judicial foreclosure in accordance with Article 3810.

Appellants do not contest appellee's right to proceed with the non-judicial foreclosure, nor do they question

the validity of the sale on September 4. Appellants only complain of the insufficiency of the purchase price and appellee's attempt to make up the deficiency.

The law is clear a creditor holding a deed of trust may, upon a debtor's default on a note, buy the property itself at a foreclosure sale and, if the sale of the property does not bring enough to satisfy the debt, sue the debtor for the deficiency. *Smith v. Olney Federal Savings and Loan Ass'n.*, 415 S.W.2d 515 (Tex. Civ. App.—Eastland 1967, no writ). In addition, the mere inadequacy of the consideration for the property will not, without more, render a foreclosure sale void if the sale was legally and fairly made. *Tarrant Savings Ass'n. v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965). The Texas Supreme Court has further held that before a foreclosure sale can be reversed on appeal "[t]here must be evidence of (an) irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price." *American Savings & Loan Ass'n. of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); See *Lawson v. Gibbs*, 591 S.W.2d 292, 295 (Tex. Crim. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

While not directly complaining about the inadequacy of the purchase price, appellants assert appellee is bound by its stipulation in the bankruptcy proceeding and cannot now assert a deficiency. Appellee's only stipulation, however, was that *at the time of the Joint Application and settlement agreement* (on December 8, 1977) there was substantial equity in the property over and above the outstanding debt. The only testimony as to the value of the property was from Edmundson himself, who stated

at the bankruptcy hearing he believed the fair market value of the hotel to be "approximately $3,500,000.00." This value, however, was never agreed to by appellee.

Furthermore, there was no evidence presented at trial as to the value of the property at the time of the foreclosure sale in September, 1979, almost two years after the Bankruptcy Court hearing. Edmundson swore in an affidavit in opposition to appellee's Motion for Summary Judgment he estimated the value of the property to be in excess of $4,200,000. But no real evidence was presented as to the actual fair market value of the property at the time of the sale, save the $1,750,000 figure paid by appellee.

We therefore do not agree with appellants that appellee must be bound by its stipulation of the property's value. An exact figure was never specified in the stipulation, and the value of the property could have decreased as easily as increased in the two years before the foreclosure sale. See *Wendlandt v. Wendlandt*, 596 S.W.2d 323 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). Without a stipulated figure or any real evidence of the actual value of the property, we cannot bind appellee.

Concepts of collateral estoppel, res judicata and full faith and credit are also not applicable doctrines under the facts of this case. Collateral estoppel and res judicata can only serve as a bar to a subsequent proceeding when there is an identity of issues in the two actions.

> It is a general rule in this state that the former judgment or litigation relied on as having adjudicated the matter and as a bar for further proceedings should have involved and determined the same final issue or that such issue or question should have been fairly within the scope of the pleadings.

Cone v. City of Lubbock, 395 S.W.2d 651, 653-654 (Tex. Civ. App.—Amarillo, 1965, writ ref'd n.r.e.). Further, the Texas Supreme Court was held in *Hammonds v. Holmes*, 559 S.W.2d 345, 346 (Tex. 1977):

> "[A] question of fact or law, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris, is conclusively settled by the final judgment or decree therein, so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the same suit be for the same or different cause of action. *State of Oklahoma v. State of Texas*, 256 U.S. 70, 86, 41 S.Ct. 420, 422, 65 L.Ed. 831 (1920)."

Here, the same distinct issue was not before both courts. The issue before the Bankruptcy Court at the December 8, 1977 hearing was whether the property could be removed from under the automatic stay assuming it possessed substantial equity above the outstanding debt at *that particular point in time*. Since the validity of the non-judicial foreclosure sale was never in question, the issue before the trial court below was the outstanding amount due on the debt after partial satisfaction had been accomplished through the foreclosure sale. As stated above, there was no final adjudication of the value of the property by the Bankruptcy Court. Nor was there any finding of fact as to a specific value of the property. Therefore, it is difficult to imagine how appellee could be bound by that earlier proceeding when presenting a different issue below. Clearly, res judicata, collateral estoppel and full faith and credit do not apply to this case. *Valley International Properties, Inc., v. Brownsville Savings & Loan*

Ass'n., 581 S.W.2d 222, 225-226 (Tex. Civ. App.—Corpus Christi 1979, no writ).

Apellants argue further that their position is supported by the case of *In the Matter of Sonny Martini Inns, Inc.*, 2 Bankr. Ct. Dec. 642 (S.D. Tex. 1976) (*Martini*), also heard before Judge Blinn. In *Martini*, a secured creditor possessing a deed of trust acquired an exception from an automatic stay so as to obtain satisfaction on a debt. As part of the hearing in Bankruptcy Court, the secured creditor agreed the equity in the property exceeded the outstanding debt. Shortly thereafter, the secured creditor non-judicially foreclosed on the property and made a successful bid which resulted in a deficiency on the debt. The Bankruptcy Court refused to allow the suit for the deficiency, holding the creditor could not benefit from asserting two differing values before the same court. Appellants argue *Martini* is controlling on the instant case.

While we recognize the logic and authority of the *Martini* decision, we believe the instant case can be distinguished in a number of areas. First, and very important to Judge Blinn in the *Martini* holding, both the settlement hearing and the suit on the deficiency were before the same court. Judge Blinn recognized the secured creditor's ability to proceed under Texas law but saw the earlier determination of value as "binding without dispute on that same Court . . ." Id. at 643.

Second, *Martini* involved a lapse of only two months time between the determination of the value of the property at the settlement hearing and the foreclosure sale. A lapse of almost two years in the instant case makes it less certain the values remained constant as they apparently did in *Martini*. It is also unclear from *Martini* how

specific the first determination of value was in relation to the foreclosure amount. Here, we only have a vague agreement that substantial equity existed in the property.

Finally, *Martini* recognizes a secured creditor's right to proceed toward non-judicial foreclosure under Texas law. *Martini* supports the proposition a creditor may foreclose and obtain relief for any deficiency on a debt. In *Martini*, however, Judge Blinn decided not to give cognizance to that particular claim of a deficiency. At this point we take leave from *Martini*, and follow Texas law by holding there was no abuse of discretion by the trial court in upholding the deficiency claim in the instant case. Appellants' points of error one, two, three, four and nine are overruled.

Through their points seven and eight appellants claim the trial court erred in granting appellee's Motion for Summary Judgment on the basis of the deficiency of the foreclosure sale because appellants had already conveyed the property to appellee. It is appellants' position the title to the property was effectively transferred to appellee by a warranty deed on August 31, 1979. They argue the subsequent non-judicial foreclosure sale was ineffective to create a deficiency because title was already in the hands of appellee. Since the property had a value in excess of the outstanding debt, argue appellants, the effective tender constituted payment in full on the indebtedness.

We disagree. The warranty deed was recorded and delivered without appellee's knowledge or permission. There was also no acceptance of the deed by appellee. In essence, appellants attempted a unilateral conveyance of the property to avoid the foreclosure sale and to pre-

vent being held liable for any deficiency. Such unilateral conveyances are not effective in Texas absent acceptance by the grantee. See *Flato Brothers, Inc. v. Builders Loan Co. of Dallas,* 457 S.W.2d 154 (Tex. Civ. App.—Dallas 1970, no writ), a case on point where an attempted unilateral conveyance of a deed was ineffective to avoid a foreclosure sale and a suit on the deficiency. *Id.* at 157.

Appellee also brings to our attention that the settlement agreement of December 8, 1979 provided all payments of the debt were to be payable in "lawful money of the United States of America." Therefore, the attempted conveyance of the deed to the property did not constitute a valid tender or payment of the debt. In addition, appellants again assume the value of the property exceeded the indebtedness. No real evidence of the property's value is in the record. Points of error seven and eight are overruled.

Finally, appellants contend (through points of error five and six) the granting of the summary judgment was in error because appellee's attempted recovery of the deficiency resulting from the foreclosure sale is unconstitutional. Appellants maintain they are not challenging the validity of the foreclosure procedure under Article 3810, but are asserting there was a taking of appellants' property without due process of law. Claiming the existence of state action is met by appellee's invocation of the judicial process to enforce the deficiency claim, appellants assert were denied due process by appellee's circumvention of the judicial proceeding in the Bankruptcy Court. They argue the non-judicial foreclosure and the subsequent judicially enforced deficiency claim cannot constitutionally wipe out the due process of the prior judicial proceeding.

We find appellants' argument confusing. Appellants argue state action is present through appellee's use of the Texas judicial system, while at the same time they claim the due process deprivation comes from the non-judicial sale exercised by a private citizen. Furthermore, it is also difficult for this Court to envision how appellants' property was taken without due process of law. Appellants agreed in the judicially approved settlement agreement to reserve to appellee all rights of foreclosure under Texas law. Appellants state they do not question the constitutionality of Article 3810, but then they complain the non-judicial nature of the Act cannot supplant a prior judicial proceeding, even though the proceeding explicitly provided for the foreclosure sale. Appellee has not deprived appellants of their property without due process of law by proceeding under the rights reserved to it by the laws of the State of Texas and agreed to by appellants. These points of error are without merit and are overruled.

As all points of error are overruled, the judgment of the trial court is affirmed.

/s/ GEORGE E. MILLER
Associate Justice

Judgment Rendered, and Opinion filed April 1, 1982.

Panel consists of Associate Justices Miller, Morse and James.

APPENDIX B

C-2936

EDMUNDSON INVESTMENT COMPANY,
ET AL,

v.

FLORIDA TRECO, INC.

Appeal from the 157th District Court
Harris County
Cause No. 80-11,087

Judgment—April 1, 1982

"This cause, an appeal from the judgment in favor of Florida Treco, Inc., signed August 11, 1981, came to be heard on the transcript of record. We have inspected the record and find no error in the judgment. We therefore affirm the judgment of the court below.

We also order Edmundson Investment Company and William L. Edmundson and their Surety, Fidelity & Deposit Company of Maryland, to pay all costs incurred by reason of this appeal.

This decision is ordered certified below for observance."

APPENDIX C

IN THE SUPREME COURT OF TEXAS

NO. C-1322

EDMUNDSON INVESTMENT COMPANY,
et al.,
Petitioners

v.

FLORIDA TRECO, INC.,
Respondent

FROM HARRIS COUNTY
FOURTEENTH DISTRICT

PER CURIAM

In this case, there was a summary judgment for the plaintiff in a suit to recover the deficiency owed on a debt after a non-judicial foreclosure. The Court of Appeals affirmed the summary judgment. 633 S.W.2d 599.

One of the problems was the value of the property foreclosed upon. The debtor contended that the property had a value exceeding the amount at which the property sold at foreclosure. The debtor asserted that the foreclosing party had at least acquiesced in the debtor's higher estimate of the value of the property. As stated by the opinion of the Court of Appeals, this occurred some two years before the foreclosure in question.

The Court of Appeals discussed a federal bankruptcy opinion which it calls the *Martini* case.[1] There a foreclosing party, just two months before foreclosure, had represented to the same court that the property had a particular value. The *Martini* bankruptcy court would not allow the foreclosing party to recover a deficiency when the property was bought in by the forecloser for much less than the price it was represented to have been worth.

The Court of Appeals in this case distinguished the *Martini* case. In so doing, the Court of Appeals wrote that it would follow the Texas law "by holding that there was no abuse of discretion by the trial court in upholding the deficiency claim in the instant case."

We agree with the result reached by the Court of Appeals, and the writ is refused, no reversible error. We disapprove of the language of the opinion in which the court apparently places its decision on abuse of discretion, or not, by the trial court. The summary judgment does not rest on the abuse of discretion.

OPINION DELIVERED: September 22, 1982

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1. 2 Bankr. Ct. Dec. 642 (S.D. Tex. 1976) (*Martini*).

APPENDIX D

IN THE SUPREME COURT OF TEXAS

NO. C-1322

September 22, 1982

EDMUNDSON INVESTMENT COMPANY
ET AL.

v.

FLORIDA TRECO, INC.

FROM HARRIS COUNTY,
FOURTEENTH DISTRICT

Application of petitioners for writ of error to the Court of Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused, in accordance with the Per Curiam Opinion herein delivered.

It is further ordered that applicants, Edmundson Investment Company et al., and their surety, Fidelity & Deposit Company of Maryland, pay all costs incurred on this application.

APPENDIX E

IN THE SUPREME COURT OF TEXAS

NO. C-1322

November 24, 1982

EDMUNDSON INVESTMENT COMPANY
ET AL.

v.

FLORIDA TRECO, INC.

FROM HARRIS COUNTY,
FOURTEENTH DISTRICT.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX F

NO. 80-11087

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
157TH JUDICIAL DISTRICT

FLORIDA TRECO, INC.

v.

EDMUNDSON INVESTMENT COMPANY
AND WILLIAM L. EDMUNDSON, III

FINAL SUMMARY JUDGMENT

BE IT REMEMBERED that on the 10th day of August, 1981, came on to be heard The Motion for Summary Judgment filed by Plaintiff, Florida Treco, Inc. and the Cross-Motion for Summary Judgment filed by Defendants, Edmundson Investment Company and William L. Edmundson, III. Plaintiff and Defendants appeared through their attorneys of record, all parties having received adequate and timely notice of the respective Motions as provided in Rule 166-A, Texas Rules of Civil Procedure.

The Court has carefully considered the Motions, pleadings and affidavits on file at the time of the hearing, together with the admissible Exhibits attached thereto, and the Responses filed by the respective parties. The Court concludes that, from its review of these instruments and the law, there is no genuine issue as to any material fact

and that Plaintiff is entitled to judgment as a matter of law on the issues set out in its Motion, and that Defendants are not entitled to judgment on the issues set out in their Cross-Motion.

Plaintiff's Motion for Summary Judgment is hereby GRANTED. It is accordingly ORDERED, ADJUDGED AND DECREED that Plaintiff, Florida Treco, Inc., have and recover from Defendants, Edmundson Investment Company and William L. Edmundson, III, jointly and severally, the principal sum of *$405,174.28;* plus pre-judgment interest from September 4, 1979 to August 10, 1981, at the contractual rate of 15% per annum, totalling *$117,223.01;* plus additional pre-judgment interest from August 10, 1981 until the date this Judgment is signed at the contractual rate of 15% per annum, being a daily rate of *$166.51,* an additional amount of *$—0—,* plus reasonable attorney's fees as follows: *$18,391.38,* which sum is awarded in the event the judgment in this action is appealed to The Court of Appeals and an Application for Writ of Error is made to The Supreme Court of Texas and oral argument is heard thereon, provided further that said sum of *$18,391.38* is to be reduced by the sum of *$2,000.00* in the event an Application for Writ of Error is made to The Supreme Court of Texas, but no oral argument is requested by The Supreme Court or the Application is refused, provided further that said sum is to be further reduced by the sum of *$3,500.00* in the event no appeal from this judgment is prosecuted to The Court of Appeals; plus costs of Court; and

Inasmuch as it has been conclusively established that Edmundson Investment Company (the principal) is in bankruptcy and has transferred all of its assets to William

L. Edmundson, III, individually, levy of execution against Edmundson Investment Company would be a useless act, and the Sheriff or Constable is hereby DIRECTED that, Tex. Bus. & Comm. Code, Art. 34.03 to the contrary notwithstanding, he need not first attempt to levy execution against Edmundson Investment Company, but shall levy, if requested, first upon William L. Edmundson, III; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants' Cross-Motion for Summary Judgment be, and the same hereby is, DENIED.

All relief not expressly granted herein is DENIED: this Summary Judgment is the Final Judgment of this Court.

SIGNED this 11th day of August, 1981.

/s/ _____
Judge Presiding

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY NO. 74-HB-192
(CHAPTER XI)

ADVERSARY "F"

IN RE EDMUNDSON INVESTMENT COMPANY,
Debtor

BARNETT MORTGAGE TRUST,
Plaintiff

v.

EDMUNDSON INVESTMENT COMPANY,
Defendant

JOINT APPLICATION FOR AUTHORITY TO COMPROMISE CONTROVERSY

To The Honorable John R. Blinn, Bankruptcy Judge:

Come now Edmundson Investment Company (Edmundson) and Barnett Mortgage Trust (Barnett) and announced to the Court that they have agreed to compromise and settle their controversy and would respectfully show unto the Court as follows:

I.

That Barnett Mortgage Trust, as Plaintiff, has filed a Complaint in the above entitled and numbered adversary proceeding to modify the stay order previously entered by this Court to authorize them to foreclose their lien on the real property described in the Deed of Trust attached as Exhibit "B" to their Complaint, alleging that there is no equity in such property for the benefit of this estate and that it constitutes a burdensome asset. Such real property constitutes the Debtor's hotel property located on North Padre Island which is presently carrying on business under the name of The Padre Island Beach Hotel. The Defendant, Edmundson Investment Company, has filed its Answer in this adversary proceeding asserting that there is a substantial equity in such property, that it is not a burdensome asset, and that it has a realizable value for the benefit of its creditors over and above the amount of the existing indebtedness owed to Barnett secured by such property.

II.

That both Barnett and Edmundson hereby stipulate and affirmatively allege that the Padre Island Beach Hotel, the real property described in Exhibit "B" to Barnett's Complaint, has a substantial value in excess of Barnett's indebtedness which should be preserved for the benefit of the unsecured creditors of Edmundson Investment Company, Debtor.

III.

That attached as Exhibit "A" hereto is a Settlement Agreement that Applicants propose they be authorized to

enter into in order that the Debtor's equity in such property be presently preserved and a manner for the orderly payment of Barnett's indebtedness be established.

IV.

That it would be in the best interest of the Court to authorize the Debtor to enter into such Settlement Agreement (Exhibit "A") and that the Debtor further be authorized to execute any and all documents to carry out the terms and conditions of such Settlement Agreement.

WHEREFORE, PREMISES CONSIDERED, Edmundson Investment Company and Barnett Mortgage Trust pray to the Court that Edmundson Investment Company be authorized to approve the Settlement Agreement executed by them per the attached Exhibit "A" and that Edmundson Investment Company be authorized to execute any and all documents necessary to carry out the terms and conditions of such Settlement Agreement.

Respectfully submitted this 8th day of October, 1977.

EDMUNDSON INVESTMENT
COMPANY, DEBTOR
IN POSSESSION

By: /s/ ROBERT C. MALEY, JR.
Robert C. Maley, Jr.
Attorney In Charge

OF COUNSEL:

SHEINFELD, MALEY & KAY
2130 Two Shell Plaza
Houston, Texas 77002
713-224-3640

BARNETT MORTGAGE
TRUST

By: /s/ D. MICHAEL DALTON
D. Michael Dalton
Attorney in Charge

OF COUNSEL:

BUTLER, BINION, RICE, COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
713-237-3111

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY NO. 74-HB-192
(CHAPTER XI)

ADVERSARY "F"

IN RE EDMUNDSON INVESTMENT COMPANY,
Debtor

BARNETT MORTGAGE TRUST,
Plaintiff

v.

EDMUNDSON INVESTMENT COMPANY,
Defendant

ORDER AUTHORIZING COMPROMISE OF CONTROVERSY

At Houston, Texas, on this 8th day of December, 1977, came on for hearing the Joint Application of Edmundson Investment Company, Debtor, and Barnett Mortgage Trust to Compromise a Controversy existing between Barnett Mortgage Trust and Edmundson Investment Company, and it appearing to the Court that no notice of such Application to Compromise has been given and none being needed, and it further

Appearing to the Court after having heard the testimony and having the Exhibits that there is substantial equity in the real property which is the subject of this Adversary Proceeding, and

Upon such testimony and Exhibits, this Court does specifically find that a substantial equity does exist in such property in favor of the Debtor, and it further

Appearing to the Court that such Compromise is in the best interest of this Debtor and this estate; it is therefore

ORDERED, that Edmundson Investment Company is hereby authorized to compromise this controversy upon the terms and conditions of the Settlement Agreement per the attached Exhibit "A", and that Edmundson Investment Company is further authorized to execute any and all documents necessary to carry out the terms and conditions of such Settlement Agreement.

/s/ JOHN R. BLINN
John R. Blinn
United States Bankruptcy Judge

APPENDIX I

NO. 80-11087

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
157TH JUDICIAL DISTRICT

FLORIDA TRECO, INC.,
Plaintiff

v.

EDMUNDSON INVESTMENT COMPANY AND
WILLIAM L. EDMUNDSON, III,
Defendants.

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER

To The Honorable Judge Of Said Court:

COME NOW Defendants Edmundson Investment Company (hereinafter "Edmundson Investment") and William L. Edmundson, III (hereinafter "Edmundson") and file this their First Amended Original Answer and in support thereof would show unto the Court the following:

I.

Pursuant to Rule 92, Texas Rules of Civil Procedure, Defendants deny each and every allegation made by Plaintiff in its Original Petition and demand strict proof thereof.

II.

For further answer, Defendants would allege that Plaintiff is estopped from asserting any claim of deficiency or monies owing with respect to that certain property in Nueces County, Texas (the "Property") referenced in the Plaintiff's Original Petition because of the following:

On or about April 2, 1974, Edmundson Investment filed a Chapter XI proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, styled and numbered *In re: Edmundson Investment Company, Debtor,* Bankruptcy No. 74-HB-192. Thereafter, the Plaintiff in this suit, previously known as Barnett Mortgage Trust (hereinafter "Plaintiff"), filed a Complaint in the Bankruptcy Court seeking authority of that Court to foreclose under their Deed of Trust. A true and correct copy of the Complaint is attached hereto as Exhibit "A" and incorporated herein by reference for all purposes.

Thereafter, Plaintiff and Edmundson Investment entered into a Settlement Agreement (the "Settlement Agreement") which formed the basis of a Joint Application for Authority to Compromise Controversy (the "Joint Application"), a true copy of the Joint Application and Settlement Agreement being attached hereto as Exhibit "B" and incorporated herein by reference for all purposes.

In the Joint Application representatives of both Plaintiff and Edmundson Investment recited as follows:

> "That both Barnett [Plaintiff] and Edmundson hereby stipulate and affirmatively allege that the Padre Island Beach Hotel, the real property described in Exhibit "B" to Barnett's Complaint, *has a substan-*

tial value in excess of Barnett's indebtedness. . . ." (emphasis supplied).

III.

Defendants would further show that pursuant to the aforesaid Joint Application, the Honorable John R. Blinn, United States Bankruptcy Judge, signed and entered on December 8, 1977, an Order Authorizing Compromise of Controversy (the "Order") which stated in part as follows:

> "Upon such testimony and Exhibits, *this Court does specifically find that a substantial equity does exist in such property. . . .*" (emphasis supplied).

A true copy of the Order is attached hereto as Exhibit "C" and incorporated herein by reference for all purposes.

IV.

Because of the foregoing, Defendants would allege that Plaintiffs are barred by collateral estoppel, judicial estoppel, equitable estoppel, and *res judicata* to assert any deficiency in the property.

V.

Defendants would show that the Order of the Bankruptcy Court should be given full faith and credit. The Order constituted a final and irreversible judgment as to the basis for Plaintiff's present claim.

VI.

For further answer, if same be necessary, Defendants would further show that the purported foreclosure sale conducted by Plaintiff was of no force and effect whatsoever inasmuch as legal title to the Property had passed to Plaintiff and vested in Plaintiff prior to foreclosure by

virtue of a Warranty Deed dated August 31, 1979 and filed of record prior to the purported foreclosure by Plaintiff, a true copy of the said Warranty Deed being attached hereto as Exhibit "D" and incorporated herein by reference for all purposes. Such conveyance further constituted payment in full of the outstanding balance on the promissory note.

Because legal title to the Property passed to Plaintiff prior to the attempted foreclosure sale, no Deed of Trust Lien existed upon the Property in favor of the Plaintiff upon which Plaintiff could foreclose and no deficiency of any kind now exists or has existed in favor of Plaintiff. Additionally, no Deed of Trust lien existed because the note had been paid in full by such transfer and thereby was extinguished at the time of the foreclosure sale.

VII.

Defendants would also affirmatively allege that Article 3810, Vernon's Annotated Texas Statutes, is unconstitutional in its application under the circumstances of this case inasmuch as it would allow a deficiency to be falsely and fraudulently "created" by Plaintiff to the exclusion of a prior and specific judicial determination to the contrary, thus depriving Defendants of property without due process of law.

VIII.

Defendants further allege that any purported transfer of the property pursuant to foreclosure sale by Plaintiff constitutes a fraudulent conveyance under Section 24.03 (a) of the Texas Business and Commerce Code. The price paid by Plaintiff at the foreclosure sale was no greater than approximately fifty percent (50%) of the

value of the property at that time, and that such insufficiency renders the sale void for lack of adequate consideration.

WHEREFORE, PREMISES CONSIDERED, Defendants Edmundson Investment Company and William L. Edmundson, III, pray that Plaintiff's Original Petition be in all things dismissed, that Plaintiff take nothing by any judgments herein, that Defendants be awarded court costs and reasonable attorney's fees and for such other and further relief to which Defendants may show themselves to be justly entitled.

Respectfully submitted,

RON RAMEY & ASSOCIATES

By: _____

Ron Ramey
TBA #16499000
7769 San Felipe
Houston, Texas 77063
(713) 784-2711

SHEINFELD, MALEY & KAY

By: _____

Robert C. Maley, Jr.
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APPENDIX J

NO. 80-11087

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
157TH JUDICIAL DISTRICT

FLORIDA TRECO, INC.,
Plaintiff

v.

EDMUNDSON INVESTMENT COMPANY AND
WILLIAM L. EDMUNDSON, III,
Defendants.

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

To The Honorable Judge Of Said Court:

COME NOW Edmundson Investment Company (hereinafter "Edmundson Investment") and William L. Edmundson, III, (hereinafter "Edmundson"), Defendants in the above numbered and entitled cause, and file this their Cross-Motion for Summary Judgment, and would respectfully show the Court as follows:

I.

There is no genuine issue of material fact between the parties herein on the grounds forming the basis of Defendants' Cross-Motion for Summary Judgment.

II.

On the basis of the evidence and exhibits submitted by Plaintiff in support of its Motion for Summary Judgment, and by Defendants in support of their Cross-Motion for Summary Judgment, Defendants are entitled to summary judgment as a matter of law for the reasons set forth herein and in the Response of Defendants Edmundson Investment Company and William L. Edmundson, III, to Plaintiff's Motion for Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment (hereinafter "Defendants' Memorandum Response"). Defendants' Memorandum Response and the exhibits attached thereto is fully incorporated as if set forth herein.

III.

Plaintiff seeks to recover an alleged deficiency upon a promissory note executed by Edmundson Investment and guaranteed by Edmundson. Plaintiff's action for a claimed deficiency follows a non-judicial foreclosure sale pursuant to Deed of Trust.

IV.

JUDICIAL ESTOPPEL

Plaintiff is judicially estopped and barred as a matter of law from asserting and alleging any deficiency against Defendants. Attached as Exhibit "A" is a certified copy of a Joint Application for Authority to Compromise Controversy filed by Plaintiff's predecessor in interest, Barnett Mortgage Trust (hereinafter collectively referred to as "Plaintiff") in Edmundson Investment's earlier Chapter XI arrangement proceeding. Plaintiff pled, stipulated,

agreed and represented to the Bankruptcy Court in the Joint Application, Paragraph II., that the property in issue has a substantial equity over and above the outstanding indebtedness owing on the promissory note. At the hearing to consider the Joint Application, the parties jointly established an outstanding indebtedness of approximately $2,200,000.00 and a value of approximately $3,500,-000.00 for the property secured thereby. A true, correct and certified copy of the transcript of the hearing is attached hereto and to Defendants' Memorandum Response as Exhibit "B". The affidavit of Robert C. Maley, Jr., filed herewith, further describes Plaintiff's representations, stipulations and admissions before the Bankruptcy Court.

Additional details surrounding the prior judicial proceeding, which involved the same parties in interest, the same property and the same indebtedness sued upon herein, are set forth in Defendants' Memorandum Response filed this date at Part II.A. On the basis of Plaintiff's prior allegations, representations and stipulations to the Bankruptcy Court in December, 1977, Plaintiff is now judicially estopped from urging an inconsistent and contrary position before this Court that a deficiency does exist between the value of the property obtained by Plaintiff and the amount of the indebtedness.

Because there are no outstanding and genuine issues of material fact with respect to this question, as Plaintiff's prior position is a matter of judicial record, Defendants are entitled to summary judgment as a matter of law. Plaintiff's claim for a deficiency should be dismissed on the basis of judicial estoppel.

V.

COLLATERAL ESTOPPEL AND RES JUDICATA

Plaintiff further is collaterally estopped as a matter of law and barred by the doctrine of *res judicata* from re-urging before this Court a claim for deficiency. Attached as Exhibit "D" hereto and to Defendants' Memorandum Response is a true, correct and certified copy of the Order Authorizing Compromise of Controversy, entered by the Bankruptcy Court on December 8, 1977, wherein the Bankruptcy Court specifically found that

> [u]pon such testimony and exhibits, the Court does specifically find that a substantial equity does exist in such property. . . ."

The parties in interest before Judge Blinn in the bankruptcy proceeding, and in particular in the Adversary "F" Proceeding instituted by Plaintiff, are the same as the parties before this Court. Moreover, the same property, promissory note, deed of trust, and indebtedness are in issue here as were in the Bankruptcy Court.

The Bankruptcy Court's finding of substantial equity in the property over and above the indebtedness owed by Defendants to Plaintiff was an essential finding of fact made by the Bankruptcy Court as a *sine qua non* to its decision approving a settlement between Plaintiff and Defendant Edmundson Investment authorizing a foreclosure by Plaintiff if the Defendants thereafter defaulted under the terms of the promissory note and a Modification Agreement entered into between the parties.

Additional facts and circumstances surrounding Defendants' collateral estoppel and *res judicata* claim, and

the case authority supporting Defendants' position, are set forth in Defendant's Memorandum Response submitted herewith at Part II.A.2.-3. On the basis of the case authority and Judge Blinn's specific finding of fact that the value of the property substantially exceeds the indebtedness owed, Plaintiff is now barred as a matter of law by the doctrines of collateral estoppel and *res judicata* from re-asserting the issue in this proceeding and now claiming a deficiency. Judge Blinn's finding and conclusion of a "substantial equity" in the property is binding on Plaintiff, these Defendants and this Court, and should not be disturbed.

Because there are no outstanding and genuine issues of material fact as to Defendant's affirmative defenses of collateral estoppel and *res judicata,* Defendants' Cross-Motion for Summary Judgment should be granted and Plaintiff's claim and cause of action for deficiency dismissed.

VI.

UNCONSTITUTIONAL PROCEDURE

Defendants further are entitled to summary judgment as a matter of law because the undisputed facts of record establish that this deficiency action and the procedure underlying it is unconstitutional and denies Defendants due process of law. Unlike prior case law in this area, sufficient government action *is* present in the instant case to warrant application of constitutional principles because Plaintiff would not have been able to conduct a non-judicial foreclosure sale pursuant to Article 3810 *but for* the Order of Judge Blinn relieving Plaintiff of the automatic stay pursuant to Bankruptcy Rule 11-44. Judge

Blinn's Order was expressly premised on his fact determination that no deficiency would be present upon foreclosure and that a substantial equity exists in the property over and above the indebtedness owed to Plaintiff.

Plaintiff now seeks to circumvent, reject and overcome Judge Blinn's prior judicial determination by way of a subsequent non-judicial foreclosure sale pursuant to Article 3810. Plaintiff has created the deficiency by nothing more than the "abracadabra" of a low bid price at the foreclosure sale.

Defendants would submit that if Plaintiff's arbitrary actions taken pursuant to a *non-judicial* sale under Article 3810, including the creation of an artificial "deficiency", is deemed to take precedence over Judge Blinn's earlier *judicial* determination to the contrary, then such a procedure denies these Defendants due process of law and their ability to rely upon the affirmative defenses of judicial estoppel, collateral estoppel, *res judicata* and full faith and credit that would otherwise fully apply. In essence, it is Defendants' position that a judicial determination as to the issue of fact cannot be overcome by a subsequent private act pursuant to state statute such as Article 3810. Further support for Defendant's position with respect to the unconstitutionality of Plaintiff's procedure is set forth in Defendants' Memorandum Response submitted herewith at Part II.C.

Because there are no outstanding and genuine issues of material fact with respect to Defendant's affirmative defenses that the procedure in question is unconstitutional, Defendants are entitled to summary judgment as a matter of law that Plaintiff's procedure is unconstitutional and that Plaintiff's petition should be dismissed.

VII.

INADEQUATE PRICE AND IRREGULARITY

Defendants further are entitled to summary judgment as a matter of law because the bid price at the foreclosure sale was wholly inadequate in light of the real value of the property at that time, and other irregularity or circumstances tending to show a wrongdoing exist in the instant case sufficient to void Plaintiff's deficiency attempt. The inadequacy of price for the property is established by the exhibits submitted herewith in connection with the prior judicial proceeding in the Bankruptcy Court, including Plaintiff's own appraisal attached hereto as Exhibit "C", Judge Blinn's determination that the value is substantially in excess of the approximate $2,200,000.00 indebtedness existing at the time of the hearing, as well as by the Affidavit of William L. Edmundson, III, filed herewith. There is no evidence submitted by Plaintiff to support a finding that the bid price at foreclosure was adequate.

Additionally, based upon the circumstances surrounding the prior judicial proceeding as described above and at length in Defendants' Memorandum Response, these procedural facts stemming from the earlier judicial proceeding and the position taken by Plaintiff in such proceedings constitute the other irregularity or circumstances necessary to show wrongdoing so as to make unlawful Plaintiff's foreclosure sale and present action for deficiency. Further detail as to this basis for Defendants' summary judgment motion is set forth in Defendants' Memorandum Response submitted herewith at Part II.D.

Because there are no genuine or outstanding questions of fact and the inadequacy of price with other irregularity

can be established as a matter of law, Defendants' Cross-Motion for Summary Judgment should be granted.

VIII.

PRIOR DEED IN LIEU OF FORECLOSURE

Defendants' Cross-Motion for Summary Judgment also should be granted because Defendants previously conveyed the property in question to Plaintiff at a time prior to the subsequent foreclosure sale conducted by Plaintiff. As set forth in the Affidavits of Robert C. Maley, Jr. and William L. Edmundson, III, filed herewith, Plaintiff was conveyed legal title to the property by Warranty Deed on August 31, 1979, five (5) days prior to the scheduled foreclosure sale.

The execution and filing of this Warranty Deed effectively transferred legal title to the Plaintiff and constituted a valid tender of payment in full on the promissory note, given that the value of the property at the time of foreclosure was more than $1,000,000.00 greater than the outstanding indebtedness owed by Defendant to Plaintiff at that time.

In light of Defendants' valid tender and payment, and the reconveyance of the property to Plaintiff prior to Plaintiff's subsequent foreclosure, Plaintiff has no valid cause of action for a claimed "deficiency" and Defendant is entitled to summary judgment as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendants Edmundson Investment Company and William L. Edmundson, III, respectfully pray that this Court grant Defendants' Cross-Motion for Summary Judgment, and such other and further relief, both at law and in equity, to

which Defendants may show themselves to be justly entitled.

Respectfully submitted,

RON RAMEY & ASSOCIATES

By: _____

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APPENDIX K

NO. C2936

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

EDMUNDSON INVESTMENT COMPANY AND
WILLIAM L. EDMUNDSON, III,
Appellants,

v.

FLORIDA TRECO, INC.,
Appellee.

Appealed from the 157th Judicial District
Court of Harris County, Texas

BRIEF FOR APPELLANTS

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and William L. Edmundson, III

* * *

POINTS OF ERROR FIVE AND SIX
(Restated)

The Trial Court erred in granting Appellee's Motion for Summary Judgment because Appellee's recovery of a deficiency in the instant case is unconstitutional.

The Trial Court erred in denying Appellants' Cross-Motion for Summary Judgment on their affirmative defense that Appellee's recovery of a deficiency in the instant case is unconstitutional.

ARGUMENT AND AUTHORITIES

At the outset, Appellants wish to stress that it is not their position that the Article 3810 non-judicial foreclosure procedure, in and of itself, is unconstitutional. *See Armenta v. Nussbaum,* 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Barrerra v. Security Building & Investment Corp.,* 519 F.2d 1166 (5th Cir. 1975). As in *Martini,* Appellants simply do not challenge the validity of the foreclosure procedure and corresponding transfer of the property.

Rather, Appellants' constitutional challenge is directed at Appellee's use of a non-judicial procedure to create a "lack of equity" and purported deficiency, coupled with Appellee's invocation of judicial process to enforce this "deficiency" notwithstanding the Bankruptcy Court's prior determination that there is equity as between this particular property and this particular debt. Thus, if it is held

on these unique facts that Appellee's *ex parte* procedure is sufficient to (1) take precedence over Appellee's stipulations and the Bankruptcy Court's earlier judicial determination to the contrary; and (2) thereby precludes Appellants' utilization of the affirmative defenses of estoppel, res judicata and full faith and credit otherwise applicable to the Court's Order, then such a deficiency procedure and fiction, if sanctioned and enforced, constitutes a taking of Appellants' property without due process of law.

The due process clause of the Fourteenth Amendment of the United States Constitution provides ". . . nor shall any State deprive any person of life, liberty or property without due process of law." Article 1, Section 19 of the Constitution of the State of Texas likewise directs that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Texas courts have recognized the similar intent and reach of these two due process provisions. *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249 (1887).

There is sufficient state action in the instant case to bring into play due process standards of the Fourteenth Amendment. Appellants do not dispute that a secured party can recover back the secured property at a non-judicial foreclosure sale and that this self-help under Article 3810 does not, under present law, entail state action. *See Armenta v. Nussbaum, supra; Barrera v. Security Building & Investment Corp., supra.* But, Appellee here is taking the further step of asserting an outstanding deficiency against Appellants and is resorting to the judicial process to effect a final determination of the parties' rights in this regard. Indeed, Appellee cannot enforce its claimed

deficiency without such judicial determination. This invocation of the judicial process to enforce the purported deficiency and sustain Appellee's course of conduct is sufficient state action to invoke due process considerations. *Shelley v. Kraemer,* 334 U.S. 1, 18-27, 68 S.Ct. 836, 844-46, 92 L.Ed. 1161 (1948).

Appellee and Appellant Edmundson Investment previously have obtained a judicial determination unchallenged by affidavit or otherwise that the value of Appellee's security (the property) is substantially in excess of the amount of outstanding indebtedness owed. Appellee now seeks to substitute its arbitrary bid price at its follow-up foreclosure sale for the Bankruptcy Court's earlier finding, and to compare this arbitrary figure with the note indebtedness to create a lack of equity. Appellee has regained ownership of the property. For Appellee to now be able to circumvent and overcome this prior judicial determination of equity, which was the basis for Appellee's right to foreclose in the first place, by way of an arbitrary, non-judicial bid price paid by Appellee *to itself* is to deny these Appellants due process of law.

Is it that simple? Is Appellee merely required to waive its magic wand at a non-judicial sale and thereby wipe clean the judicial slate by the mere "abracadabra" of a bid price? *Martini* says no. This non-judicial procedure and deficiency fiction cannot constitutionally take precedence over a prior judicial determination between these parties on the issue of the value of the security versus the amount of the debt. To enforce and sustain such a result is to unconstitutionally override the Bankruptcy Court's prior ruling and to unconstitutionally deprive Appellants of their affirmative defenses discussed above.

The law in this regard is clear. Private interests and state action under the due process clause are not to be evaluated in terms of labels, semantics or fictions, and constitutional protections cannot be avoided by reliance on any such fictions or labels. *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); *Knight v. State Bd. of Education,* 200 F. Supp. 174, 178 (M.D. Tenn. 1961). The due process clause vests in a litigant those rights vested by the common law. *Screven County v. Brier Creek Hunting & Fishing Club,* 202 F.2d 369, 371 (5th Cir. 1953). Thus, a party is entitled to recognition of those rights accorded by judgment in an earlier proceeding, including application of doctrines of estoppel and res judicata. *See, e.g., United States v. Haines,* 485 F.2d 564 (7th Cir. 1973), *cert. denied,* 417 U.S. 977, 94 S.Ct. 3184 (1974); *Southwest Airlines Co. v. Texas Int'l. Airlines,* 546 F.2d 84, 94-103 (5th Cir.), *cert. denied,* 434 U.S. 832, 98 S.Ct. 117 (1977); *State of Maryland v. Capital Airlines, Inc.,* 267 F. Supp. 298, 304 (D. Md. 1967). These rights cannot be undercut or rendered ineffective by arbitrary and capricious action that is judicially enforced by the State. Indeed, the Constitution confers upon no party the right to demand action by State judicial process which has the effect of abridging the constitutional guarantees and protections of other individuals. *Shelley v. Kraemer, supra* at 846.

Because of the prior judicial involvement with these same parties, this same property and the same indebtedness, the State of Texas has a compelling interest in ensuring that a private citizen cannot use the self-help procedures of Article 3810 so as to circumvent and discard

a prior federal judicial determination. Because of the usual *ex parte* nature of a non-judicial foreclosure proceeding pursuant to Article 3810, and because such a procedure, when coupled with a subsequent action for an asserted deficiency, can result in a windfall to the secured creditor, courts in this State have been extremely hesitant to rubber stamp such a procedure. *See, e.g., Crow v. Heath,* 516 S.W.2d 225 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). Here, Appellee in a judicial proceeding agreed, stipulated and represented that the value of the property securing the debt substantially exceeds the debt. Appellee elected this position of substantial equity to accomplish its remedy of foreclosure without regard to the automatic stay. Appellee should be bound by these representations and its conduct before the Bankruptcy Court. Appellee additionally should be bound by the judicial finding of "substantial equity" in the property that it sought and obtained from the Bankruptcy Court.

Due process of law demands that this Court reject Appellee's attempt to override a prior federal judicial determination and the protections afforded Appellants thereby. To sanction and enforce this arbitrary and capricious procedure and this wholly-fictitious "deficiency" *on these facts* is to deprive Appellants of their property without due process of law.

* * *

APPENDIX L

NO. C2936

IN THE COURT OF APPEALS
FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

EDMUNDSON INVESTMENT COMPANY AND
WILLIAM L. EDMUNDSON, III,
Appellants,

v.

FLORIDA TRECO, INC.,
Appellee.

Appealed from the 157th Judicial Court
of Harris County, Texas

APPELLANTS' MOTION FOR REHEARING

SHEINFELD, MALEY & KAY
Robert C. Maley
Tom Collins
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Houston, Texas 77002

Attorneys for Appellants,
Edmundson Investment Company
and William L. Edmundson, III

* * *

ASSIGNMENT OF ERROR SEVENTEEN
(Restated)

THE COURT ERRED IN OVERRULING APPELLANTS' FIFTH AND SIXTH POINTS OF ERROR BECAUSE APPELLEE'S RECOVERY OF A DEFICIENCY FOLLOWING FORECLOSURE IN THE INSTANT CASE IS UNCONSTITUTIONAL.

The Court has rejected Appellants' constitutional argument on two grounds—first, that private action is comingled with state action so as to make Appellants' claim confusing; and second, that Appellants agreed to the foreclosure sale conducted by Appellee and therefore cannot complain about the present cause of action for a deficiency.

In response to the first point expressed by the Court, Appellants believe the authority of *Shelley v. Kraemer*, 334 U.S. 1, 18-27, 68 S.Ct. 836, 844-46, 92 L.Ed. 1161 (1948) is on point. In *Shelley*, property owners had entered into private agreements in the form of restrictive covenants which racially restricted the ownership and occupancy of real estate. A landowner breached the restrictive covenant and the property owners filed suit in state court to enforce the private agreement. While the action complained of was created by private conduct, the Supreme Court held that the invocation of the judicial process to enforce the private action and agreements was sufficient state action to invoke due process considerations.

The facts of the instant case are parallel. Appellee has created its claim of a deficiency through its non-judicial

and private foreclosure sale. Appellants do not dispute the ability of Appellee to conduct such a sale, nor do Appellants dispute the constitutionality, in and of itself, of a private foreclosure sale under Texas law. *See Armenta v. Nussbaum*, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Barrerra v. Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975). However, when Appellee invokes the judicial process and asks the courts of Texas to judicially affirm and award the "deficiency" that Appellee has created through its bid price, this constitutes under *Shelley* the invocation of state action sufficient to raise due process considerations.

As to the Court's second argument, the fact that Appellee has the right to conduct a non-judicial foreclosure sale under Article 3810 does not automatically equate with Appellee's right to recover a deficiency judgment. Against the backdrop of the earlier Bankruptcy Court proceeding between these same parties as to the same property and debt, Appellants urge that the Texas and common law concepts of estoppel, res judicata, collateral estoppel and full faith and credit bar Appellee's claim. Thus, it is Appellants' position that this Court approves an unconstitutional procedure if it allows Appellee, merely by stating an abracadabra bid price at a non-judicial sale, to wipe clean the judicial slate and the legal protections that stem from the Bankruptcy Court's earlier ruling.

* * *

APPENDIX M

NO. C2936

IN THE
SUPREME COURT OF TEXAS

EDMUNDSON INVESTMENT COMPANY
AND WILLIAM L. EDMUNDSON, III,
Petitioners,

v.

FLORIDA TRECO, INC.,
Respondent.

APPLICATION FOR WRIT OF ERROR

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* * *

POINT OF ERROR FOUR
(Restated)

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S RECOVERY OF A DEFICIENCY ON THESE FACTS IS NOT UNCONSTITUTIONAL (Germane to Seventeenth Assignment of Error in Appellants' Motion for Rehearing.)

At the outset, Petitioners wish to stress that it is not their position that the Article 3810 non-judicial foreclosure procedure is unconstitutional per se. *See Armenta v. Nussbaum*, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Barrerra v. Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975). As in *Martini*, Petitioners do not challenge the validity of the foreclosure procedure and corresponding transfer of the property.

Rather, Petitioners' constitutional challenge is directed at Respondent's invocation of the state judicial process to enforce a "deficiency" it created at a non-judicial sale, notwithstanding the Bankruptcy Court's prior determination that there is substantial equity and not a deficiency as between this particular property and debt. Thus, if it is held on these unique facts that Respondent's *ex parte* procedure to create a fictional "deficiency" is sufficient to (1) take precedence over Respondent's stipulations and the Bankruptcy Court's earlier judicial determination to the contrary; and (2) thereby precludes Petitioners' utilization of the affirmative defenses of estoppel, res judicata and full faith and credit otherwise applicable to the Court's Order, then such a deficiency procedure and fiction, if sanctioned and enforced by the courts of this

state, constitutes a taking of Petitioners' property without due process of law. *See* United States Constitution, Fourteenth Amendment; Constitution of the State of Texas, Article 1, Section 19.

Respondent's invocation of the judicial process to enforce its claimed deficiency and sustain its course of conduct is sufficient state action to invoke due process considerations. *Shelley v. Kraemer,* 334 U.S. 1, 18-27, 68 S.Ct. 836, 844-46, 92 L.Ed. 1161 (1948). In *Shelley,* property owners had entered into private agreements in the form of restrictive covenants which racially restricted the ownership and occupancy of real estate. A landowner breached the restrictive covenant and the property owners filed suit in state court to enforce the private agreement. While the action complained of was created by private conduct, the Supreme Court held that the invocation of the judicial process to enforce the private action was sufficient state action to invoke due process considerations. Petitioners acknowledge that a secured party's use of Article 3810 does not by itself entail state action under Texas law. *See Armenta v. Nussbaum, supra; Barrera v. Security Building & Investment Corp., supra.* But under *Shelley* and its progeny, invoking the judicial process thereafter to assert the outstanding deficiency does constitute the use of state action.

Under the due process clause, private interests and state action are not to be evaluated in terms of labels, semantics or fictions, and constitutional protections cannot be avoided by reliance on any such fictions or labels. *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); *Knight v. State Bd. of Education,* 200 F. Supp. 174, 178 (M.D. Tenn. 1961). Constitutional protections under the due process clause

include those rights vested in a litigant by the common law. *Screven County v. Brier Creek Hunting & Fishing Club,* 202 F.2d 369, 371 (5th Cir. 1953). These include those rights accorded by judgment in an earlier proceeding, including estoppel and res judicata. *See, e.g., United States v. Haines,* 485 F.2d 564 (7th Cir. 1973), *cert. denied,* 417 U.S. 977, 94 S.Ct. 3184 (1974); *Southwest Airlines Co. v. Texas Int'l Airlines,* 546 F.2d 84, 94-103 (5th Cir.), *cert. denied,* 434 U.S. 832, 98 S.Ct. 117 (1977); *State of Maryland v. Capital Airlines, Inc.,* 267 F. Supp. 298, 304 (D. Md. 1967). These rights cannot be undercut or rendered ineffective by arbitrary action that is judicially enforced by the state. Indeed, the Constitution confers upon no party the right to demand action by state judicial process which has the effect of abridging the constitutional guarantees and protections of others. *Shelley v. Kraemer, supra* at 846.

Because of the prior United States Bankruptcy Court involvement with these same parties, property and debt, the courts of this State have a compelling interest in ensuring that a private citizen cannot use the self-help procedures of Article 3810 to circumvent and discard the Bankruptcy Court's prior determination and the constitutional protections afforded Petitioners thereby. Respondent has created an artificial and fictional deficiency through an arbitrarily-low bid price. This private conduct to create a windfall "deficiency" cannot constitutionally take precedence over a prior judicial determination as to the value of the security versus the amount of the debt. To enforce and sustain such a result is to unconstitutionally override the Bankruptcy Court's prior ruling and to unconstitutionally deprive Petitioners of their affirmative defenses and due process protections afforded thereby.

* * *

APPENDIX N

NO. C2936

IN THE
SUPREME COURT OF TEXAS

EDMUNDSON INVESTMENT COMPANY AND
WILLIAM L. EDMUNDSON, III,
Petitioners,

v.

FLORIDA TRECO, INC.,
Respondent.

MOTION FOR REHEARING

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* * *

POINT OF ERROR FIVE
(Restated)

THE COURT ERRED IN DISREGARDING THE UNCONSTITUTIONALITY OF RESPONDENT'S RECOVERY OF A DEFICIENCY ON THESE FACTS.

Petitioners reurge the arguments and authorities cited in the Application for Writ of Error under Point of Error Four with respect to the unconstitutionality of Respondent's procedure as sustained by the lower courts, and respectfully request a reconsideration upon this point.

* * *

APPENDIX O

TEXAS REVISED CIVIL STATUTES

ART. 3810. Sales under deed of trust

All sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Where such real estate is situated in more than one county then notices as herein provided shall be given in both or all of such counties, and the real estate may be sold in either county, and such notice shall designate the county where the real estate will be sold. Notice of such proposed sale shall be given by posting written notice thereof at least 21 days preceding the date of the sale at the courthouse door of the county in which the sale is to be made, and if the real estate is in more than one county, one notice shall be posted at the courthouse door of each county in which the real estate is situated.

In addition, the holder of the debt to which the power is related shall at least 21 days preceding the date of sale serve written notice of the proposed sale by certified mail on each debtor obligated to pay such debt according to the records of such holder. Service of such notice shall be completed upon deposit of the notice, enclosed in a postpaid wrapper, properly addressed to such debtor at the most recent address as shown by the records of the holder of the debt, in a post office or official depository under the care and custody of the United States Postal Service. The affidavit of any person having knowledge of the facts to the effect that such service was completed shall be prima facie evidence of the fact of service. Such sale shall be made at public vendue between the hours of 10:00 a.m. and 4:00 p.m. of the first Tuesday in any month.